

1 IN THE CIRCUIT COURT OF THE STATE OF OREGON

2 FOR THE COUNTY OF MALHEUR

3  
4 NICHOLAS McGUFFIN, )  
5 Plaintiff, )  
6 vs. ) No. 15CV1030  
7 MARK NOOTH, Superintendent, )  
8 SRCI, )  
9 Defendant. )

10  
11  
12  
13  
14  
15 **DEPOSITION OF MARLA KAPLAN**

16 Taken in behalf of the Plaintiff

17 June 24, 2019

1                   BE IT REMEMBERED THAT, pursuant to Oregon  
2 Rules of Civil Procedure, the deposition of MARLA  
3 KAPLAN was taken before Lisa J. Pace, Court Reporter  
4 and Notary Public for Oregon, on Monday, June 24,  
5 2019, commencing at the hour of time, the proceedings  
6 being reported in the offices of OSP Forensics,  
7 Clackamas, Oregon.

8                   -:-

9                   APPEARANCES:

10 APPEARING FOR THE PLAINTIFF(S)

11 Janis C. Puracal  
12 Forensic Justice Project  
13 333 SW Taylor Street, Suite 403  
14 Tigard OR 97204  
15 503-664-3641  
16 [jpuracal@forensicjusticeproject.org](mailto:jpuracal@forensicjusticeproject.org)  
17 and  
18 Brittney Plessner  
19 Oregon Innocence Project  
20 PO Box 5248  
21 Portland OR 97208  
22 503-944-2270  
23 [bplessner@oregoninnocence.info](mailto:bplessner@oregoninnocence.info)

14 APPEARING FOR THE DEFENDANT(S)

15 Paul E. Reim  
16 DOJ Trial Corrections Lit  
17 1162 Court Street NE  
18 Salem OR 97301  
19 503-947-4700  
20 [paul.reim@doj.state.or.us](mailto:paul.reim@doj.state.or.us)

21  
22  
23  
24 Also Present: John Comery

1	I N D E X		
2			
3	<u>Examinations</u>		<u>Page</u>
4			
5	EXAMINATION BY MS. PURACAL		4
6	EXAMINATION BY MR. REIM		42
7			
8	<u>Exhibits</u>		
9	<u>No.</u>	<u>Description</u>	<u>Page</u>
10	21	Power Point data	65
11			
12	<u>Information to Produce</u>		
13		Page	Line
14	Articles	6	18
15			
16	<u>Instruction by Counsel</u>		
17	<u>Page</u>	<u>Line</u>	
18			
19			
20			
21			
22			
23			
24			
25			

4

## EXAMINATION

6 | BY MS. PURACAL

7 Q. Ms. Kaplan, thank you for coming this  
8 morning.

9 A. Mm-hmm [affirmative response].

10 Q. Let's just do appearances for this record  
11 since we have a different deposition transcript from  
12 the deposition before you.

13 A. Okay.

14 MR. PURACAL: So Janis Puracal from the  
15 Forensic Justice Project representing the petitioner,  
16 Nicholas McGuffin. I have with me Brittney Plessner  
17 from the Oregon Innocence Project and John Comery  
18 from the Oregon Innocence Project.

19 MR. REIM: Paul Reim from DOJ  
20 representing the superintendent.

21 | BY MS. PURACAL: [Continuing]

22 Q. Ms. Kaplan, you are a forensic scientist in  
23 the DNA unit the Oregon State Police Forensics  
24 Division, correct?

25 A. Correct. My title is DNA technical leader.

1 moved onto a different type of technology, so that  
2 original data when we looked at it in 2012, it wasn't  
3 really apples to apples, it was apples to oranges, if  
4 that makes sense.

5 Q. So what does that tell us about when that  
6 threshold was actually lowered?

7 A. The threshold lowering on the original data  
8 didn't become required until 2012.

9 Q. So at any point in time before 2012 was the  
10 lab looking at data below that 150 threshold?

11 A. The lab was always looking at the data  
12 between 50 and 150, but the rules about what you were  
13 expected to do with that data became stricter in  
14 2012. Between 2000 and 2012 there was a fair amount  
15 of what we call analyst discretion or  
16 analyst-to-analyst variability or subjectivity and  
17 what to do with that data, and we took some of that  
18 subjectivity away in 2012.

19 Q. So before 2012 some analysts would look at  
20 that data below 150 and choose to interpret that  
21 data?

22 A. They would choose to draw -- choose to use  
23 that data in drawing specific conclusions. And  
24 again, this is what I know based on my review of the  
25 past protocols, I don't have any firsthand knowledge

1 of that; it's conversations with other analysts, I  
2 wasn't here then, but that was the -- that was the  
3 general approach.

4 And even in the 2000 protocol it says that  
5 DNA types between 50 and 150 should be interpreted  
6 with caution, and so that was something that an  
7 analyst to analyst could draw different conclusions  
8 and make different decisions.

9 Q. I'd like to point you to Exhibit No. 9 in  
10 that black binder.

11 A. Yes.

12 Q. This is just a couple of pages from the  
13 written protocol for the lab in 2000, and the second  
14 page of that is an interpretation guideline. I'm  
15 looking at point number 3 on that page. It says,  
16 "Peak heights should be a minimum of 150 relative  
17 fluorescent units (RFU). Peak heights less than 150  
18 RFU may be interpreted with caution."

19 Is that what you're referring to?

20 A. Yes.

21 Q. Is there a difference between interpreting  
22 those peak heights less than 150 versus reporting the  
23 peak heights less than 150?

24 A. So the interpretation and reporting  
25 requirements were not always aligned insofar as when

1 multiple samplings were taken from a single item.

2 There were times that just one result from those  
3 multiple samplings were reported.

4 And so the data interpretation took place  
5 in the case file, and so the analyst would document  
6 the presence of those peaks on what we call allele  
7 call tables, and so they would be interpreted and  
8 they would be documented, but the conclusions as they  
9 were listed on the report may not be fully  
10 representative of all of that data that was  
11 generated.

12 Q. So where in the protocol does it say that  
13 the analyst can interpret those peaks but then choose  
14 not to report them?

15 A. That I don't know.

16 Q. Have you reviewed that entire protocol in  
17 2000?

18 A. I have but not recently.

19 Q. When you say you don't know, is that you  
20 don't know where in the protocol it says that the  
21 analyst can choose not to report, or that you don't  
22 know if it says that in the protocol?

23 A. I don't know specifically what it says in  
24 the protocol related to interpretation versus  
25 reporting.

1 State of Oregon )  
2 County of Clackamas ) ss.

3  
4 I, Lisa J. Pace, Court Reporter and Notary  
5 Public, do hereby certify that MARLA KAPLAN  
6 personally appeared before me at the time and place  
7 mentioned in the caption herein; that the witness was  
8 by me first duly sworn on oath and examined upon oral  
9 interrogatories propounded by counsel; that said  
10 examination, together with the testimony of said  
11 witness, was taken down by me in stenotype and  
12 thereafter reduced to typewriting; and that the  
13 foregoing transcript, Pages 1 to 65, both inclusive,  
14 contains a full, true and accurate record of all such  
15 testimony adduced and oral proceedings and of the  
16 whole thereof.

17 Witness my hand at Lake Oswego, Oregon, this  
18 11th day of July 2019.



Lisa J. Pace  
Court Reporter  
Notary Public for Oregon  
My Commission expires 7/17/20